No. 806

In the Supreme Court of the United States

October Term, 1943

No. [redacted]

[redacted]

Petitioner,

v.

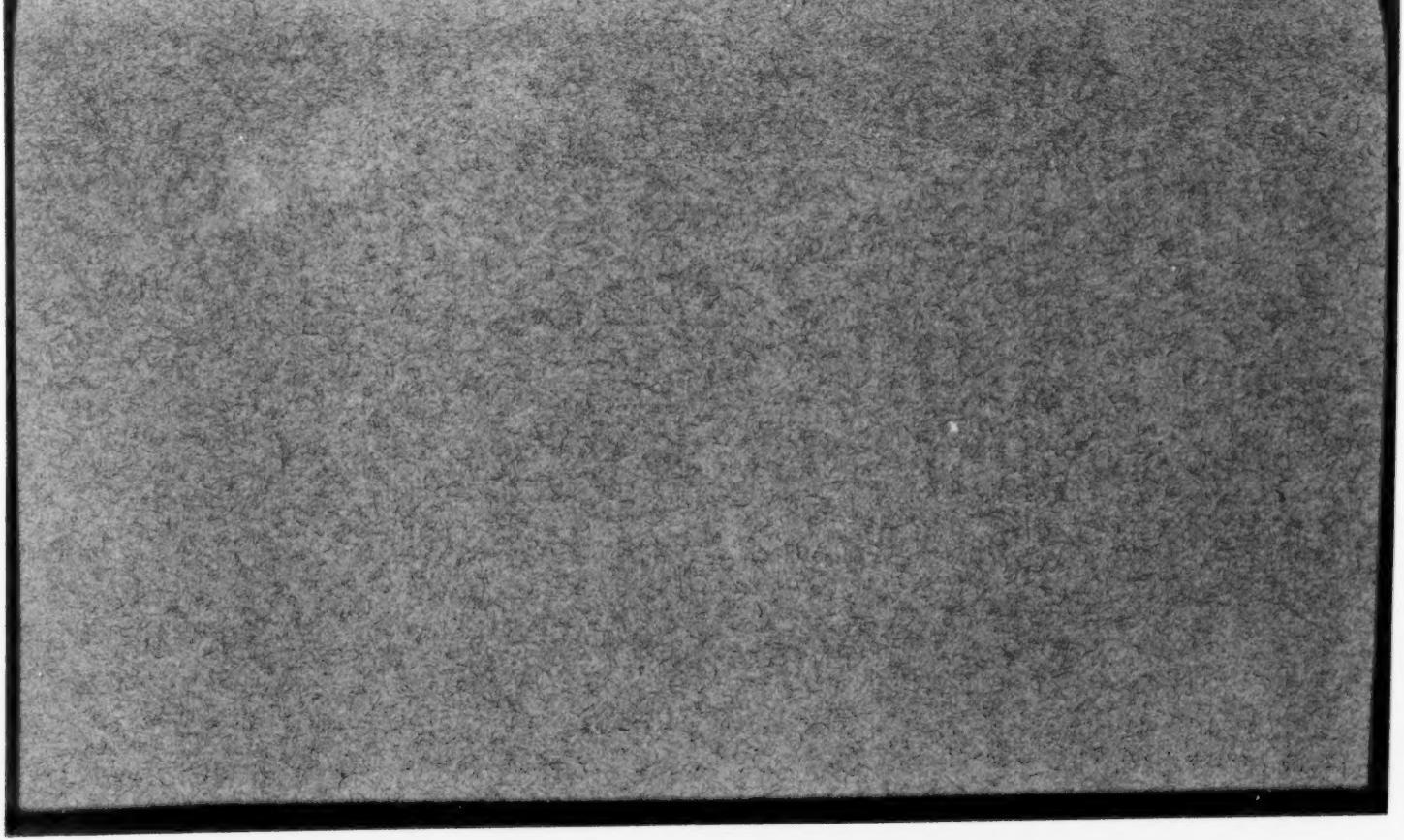
[redacted]

Respondent.

[redacted]

[redacted]

[redacted]



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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 806

ARTHUR LEDERER, PETITIONER

v.

UNITED STATES OF AMERICA EX REL. PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was filed by the District Court. Its findings of fact and conclusions of law appear in the record (R. 8, 9). The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 110–115) is reported in 140 F. (2d) 136.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered January 17, 1944 (R. 116). A petition for

rehearing was denied on February 17, 1944 (R. 118). The petition for writ of certiorari was filed in this Court on March 18, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in a *sua sponte* proceeding to have a defendant adjudged in criminal contempt of court for violation of a preliminary injunction requiring observance of price ceilings established by a regulation issued under the Emergency Price Control Act, the court may appoint attorneys of the Office of Price Administration to prosecute the suit, or whether Section 205 (b) of the Act requires that such proceedings be instituted exclusively by the Attorney General or his assistants.

2. Whether the order to show cause and the attached affidavit, made on information and belief, constituted a sufficient charge of willful violation of the injunction by the petitioner.

3. Whether petitioner's willful violation of the injunction was validly established.

4. Whether the sentence was excessive.

STATUTES AND REGULATION INVOLVED

This case involves primarily the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. Appendix, Supp. II, Sec. 901 et seq.; Revised Maximum Price Regulation No.

169 (7 Fed. Reg. 10381) issued under the Act on December 10, 1942; and Section 268 of the Judicial Code (Act of March 3, 1911, 36 Stat. 1163, 28 U. S. C. Sec. 385) dealing with the power of federal courts over criminal contempt. Also involved is Section 7 of the Federal Register Act of July 26, 1935, 49 Stat. 500, 502, 44 U. S. C. Sec. 307, prescribing the effect to be given to regulations which are published in the Register.

The applicable provisions of the Emergency Price Control Act are the following:

> SECTION 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 * * *.
>
> * * * * *
>
> SECTION 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Admin-

> istrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.
>
> SECTION 205 (b). Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

The applicable provisions of Revised Maximum Price Regulation No. 169 are Sections 1364.451 to 1364.455, inclusive (7 Fed. Reg. 10385–10392), establishing maximum prices for sales of wholesale cuts of beef, and Section 1364.401 (*id.* 10382), prohibiting sales at prices above the legal maxima.

Section 268 of the Judicial Code, dealing with the power of federal courts to punish for contempt, provides as follows:

> The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their

authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

Section 7 of the Federal Register Act reads as follows:

SEC. 7. No document [of general applicability and legal effect] required under section 5 (a) to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 2; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 5, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed,

or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the origin. '; and, (d) that all requirements of this Act and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number.

STATEMENT

Petitioner and his brother Adolph Lederer, doing business as A. Lederer Co., were engaged in the sale of beef and veal carcasses and wholesale cuts, with their principal place of business in Chicago, Illinois (R. 14). This case arose out of a complaint and petition for a preliminary injunction filed by the Price Administrator in the District Court on February 6, 1943, seeking injunctive relief under the Act to restrain petitioner and his brother from selling meat at prices in excess of those permitted by Revised Maximum Price Regulation No. 169 (R. 2, 4). Affidavits accompanied the complaint and petition (R. 5–7). After a full hearing, the Court stated findings of fact (R. 8) and conclusions of law (R. 9) and issued a preliminary injunction which restrained defendants from selling or delivering any beef or veal carcasses or wholesale cuts at prices in ex-

cess of those established by the Regulation (R. 10, 11). The writ was served personally on defendants (R. 13).

On August 23, 1943, the Administrator of the Office of Price Administration filed a petition in the District Court entitled "Request for the Prosecution of Adolph Lederer and Arthur Lederer, doing business under the firm name of A. Lederer Company, for Criminal Contempt of Court" (R. 13–16).

The request and the attached affidavit informed the court that defendants had disobeyed the preliminary injunction by selling beef and veal carcasses and wholesale cuts at prices in excess of those permitted by the Regulation and that, in order to avoid discovery, they had engaged in the practice of falsely stating ceiling prices upon the invoices covering the sales in question and had at the same time demanded and received additional payments in cash, so as to bring the prices received above those permitted by the Regulation (R. 15–16). The petition concluded by requesting the court to institute, *sua sponte,* criminal contempt proceedings against the defendants (R. 15).

The court appointed attorneys employed by the Office of Price Administration as its representatives to conduct the prosecution (R. 20), and issued an order[1] directed to defendants requiring

[1] The order to show cause was not captioned in the same fashion as the original injunction proceeding and bore no file

them to appear and show cause why they should not be held in criminal contempt of court and punished for the alleged violations (R. 21–22). Any right the defendants might have to a jury trial was waived (R. 29) and a hearing was held.[2]

The evidence at the trial conclusively showed (R. 111) that meats had been sold to retailers at prices in excess of those permitted by the Regulation. The evidence revealed that written invoices were given to the purchasers itemizing the amounts due as equal to or slightly less than the proper ceiling prices and that the purchaser was required to make simultaneous payments "on the side" in addition to the prices quoted on the invoices (R. 111). Eight witnesses testified that they had been forced to make "side payments" of between 7¢ and 11½¢ per pound in excess of the ceiling prices. Defendants did not take the stand, nor did they offer any evidence in their behalf (R. 68, 111). The court found Arthur Lederer guilty of contempt and sentenced him to imprison-

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number when presented to the Court. The caption of this order was "U. S. ex rel. Prentiss M. Brown, Administrator, Office of Price Administration, Plaintiff *v.* Adolph Lederer and Arthur Lederer, co-partners, doing business under the firm name of A. Lederer and Co., Defendants." The clerk of the court assigned the number 43 C 126 to these papers after they were presented. Thereafter, the cause proceeded under the new caption.

[2] Defendants did not file an answer nor did they at any time in the District Court object to the form of the proceedings or question the sufficiency of the pleadings.

ment for a year and a day (R. 89, 90). Adolph Lederer was found not guilty because of the absence of evidence to identify him with the scheme to evade the court order (R. 68, 89).

On September 14, 1943, petitioner filed notice of appeal to the Circuit Court of Appeals for the Seventh Circuit (R. 90–92). On January 17, 1944, the Circuit Court of Appeals unanimously affirmed the judgment of the District Court (R. 116). Petitions for a rehearing and for a stay of mandate were denied (R. 118, 119).

ARGUMENT

I

The District Court clearly had authority to appoint attorneys of its own selection to prosecute the contempt proceedings against the respondent. As the court below held (R. 112–113), it was entirely permissible and appropriate for the District Court to do so. Such is the frequent course of proceeding in criminal contempt cases, as this Court recognized in *Gompers* v. *United States,* 233 U. S. 604, 611–612, and as the petitioner concedes (Pet. 13). See also *McCann* v. *New York Stock Exchange,* 80 F. (2d) 211, 214 (C. C. A. 2). The petitioner argues, however (Pet. 12), that Section 205 (b) of the Emergency Price Control Act compels a different procedure in contempt proceedings for violation of injunctions issued under Section 205 (a). The former section

authorizes criminal prosecutions against violators of the Act, whose conduct the Administrator "may" call to the attention of the Attorney General who, in turn, "may, in his discretion, cause appropriate proceedings to be brought." The contention is that this provision prescribes the exclusive method of instituting criminal proceedings under the Act, including those for criminal contempt.

No reason appears for concluding that by virtue of the permissive language of the direction to the Administrator in Section 205 (b) the long-established power of federal courts to proceed directly or through counsel of their own choosing against violators of their decrees has been withdrawn in relation to injunctions to enforce a critical measure of wartime control. The quoted language is given its natural meaning if it is taken simply to authorize federal prosecutions in the usual manner.

In enacting previous legislation, intended to regulate the procedure of the courts in contempt cases, the Congress was careful to except "contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or in behalf of, the United States, but the same * * * may be punished in conformity to the usages at law and in equity now prevailing." Act of October 15, 1914, Sec. 24, 38

Stat. 730, 739, 28 U. S. C. Sec. 389. It is unlikely that in 1942, in legislating to strengthen rather than lessen the power of government, Congress intended to repeal by implication the authority which it had previously so carefully preserved.

Proceedings for contempt, instituted by a court *sua sponte,* are anomalous when viewed in relation to the conventional dichotomy of civil and criminal actions; but they are nevertheless recognized, and the issues which they raise from time to time are disposed of. *Gompers* v. *United States, supra; Western Fruit Growers* v. *Gottfried,* 136 F. (2d) 98 (C. C. A. 9). The statutes which the petitioner cites (Pet. 14), relating to the prosecution of civil and criminal proceedings in behalf of the United States by the Attorney General and his assistants and by the United States Attorneys, did not preclude the exercise through other channels of judicial powers in contempt proceedings prior to the passage of the Emergency Price Control Act. The latter enactment, far from restricting the representation of the Government in court, specifically authorized attorneys for the Administrator to appear for and represent him. Sec. 201 (a), 56 Stat. 29, 50 U. S. C. App., Supp. II, Sec. 921. It would be strange if they were not also available to a court in matters arising under the Act.

There is nothing in the Senate Report on the Emergency Price Control Act (S. Rep. 931, 77th

Cong., 2d sess.), cited by the petitioner (Pet. 13), which conflicts with the foregoing conclusions. The report does not refer to proceedings to enforce injunctions but, in discussing suits to enjoin violations, states (at page 10) that the courts "are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case."

II

Petitioner contends that the Order to Show Cause and the attached affidavit were insufficient because (1) willfulness in violating the injunction was not specifically alleged and (2) the affidavit upon which the Order to Show Cause was based and which was attached to the Order, was made upon information and belief. The Circuit Court of Appeals had no difficulty in upholding the sufficiency of the charge (R. 113–114). The Order to Show Cause stated there was good cause to believe that the petitioner and his codefendant had violated the preliminary injunction by offering for sale and selling beef and veal carcasses and wholesale cuts at prices in excess of those established by Revised Maximum Price Regulation No. 169 (R. 21). The preliminary injunction (R. 10), which was personally served upon the defendants (R. 13), had specifically called their attention to the Price Regulation and their previous alleged violations of it. No other meaning can be given to the Order to Show Cause than that it

alleges conscious, and therefore willful, violations of the injunction. The affidavit (R. 22–24) gave specificity to the charges (R. 114).

It is a sufficient answer to the petitioner's contentions to point out that he is no longer in a position to make them, since timely objection to the alleged defects was not raised in the trial court. *Tyomies Publishing Co.* v. *United States,* 211 Fed. 385, 389 (C. C. A. 6); *Sona* v. *Aluminum Castings Co.,* 214 Fed. 936 (C. C. A. 6); *Musey* v. *United States,* 37 F. (2d) 673 (C. C. A. 5); *Nye* v. *United States,* 113 F. (2d) 1006, 1008 (C. C. A. 4), reversed on other grounds, 313 U. S. 33; *Neufield* v. *United States,* 73 App. D. C. 174, 188, 118 F. (2d) 375, 389, certiorari denied, *sub nom. Ruben* v. *United States,* 315 U. S. 798. It seems clear that at most the absence of an express allegation of willfulness gives rise to an "indirect averment"—a defect of form and not of substance which even in an indictment is sufficient after verdict. *Neufield* v. *United States, supra.* Upon the merits with regard to the affidavit, there is doubt whether any affidavit was required. *In re Fletcher,* 71 App. D. C. 108, 110, 107 F. (2d) 666, 668. If any was, it could properly be upon information and belief. *Creekmore* v. *United States,* 237 Fed. 743 (C. C. A. 8).

III

Petitioner contends that willfulness in violating the injunction was not established because (1)

there was not adequate proof of the establishment of the maximum prices which the injunction was issued to enforce and (2) knowledge of these prices on the part of the petitioner was not shown. Both contentions are sufficiently answered by Section 7 of the Federal Register Act, set forth above at p. 5. As has been stated, the Price Regulation which the petitioner was charged with violating had been duly published in the Register. The trial court was required to take judicial notice of it and the petitioner was constructively informed of it. The notice to him became actual when the injunction was served upon him, if not before. As both courts below found (R. 115), his guilty knowledge was amply demonstrated by the evidence of false invoice prices and exaction of "side payments" in cash.

Petitioner urges that the decision of the Circuit Court of Appeals in the instant case is contrary to its ruling in two prior cases, *McCauley* v. *First Trust and Savings Bank,* 276 Fed. 117 (C. C. A. 7, 1921), and *Garrigan* v. *United States,* 163 Fed. 16 (C. C. A. 7, 1908). Both of these cases held that one who is not a party to an injunction decree and who did not have actual notice of it could not be held guilty of criminal contempt of court for a violation of the court order. Both cases are clearly inapplicable to the present case, where the petitioner was a party to the injunction suit, was named in the decree, and

had personal knowledge of its contents and purport.

IV

Petitioner's contention that the sentence was excessive was properly rejected by the court below. In punishing for contempt the District Court exercised a discretion which has not been specifically limited except by constitutional provisions. *Creekmore* v. *United States,* 237 Fed. 743 (C. C. A. 8). The findings of fact made by the District Court and affirmed in all respects by the Circuit Court of Appeals established a persistent practice of charging prices far in excess of ceiling prices. Both courts found the violations numerous and inconsistent with mere oversight or mistake. On the contrary, they were characterized as flagrant and accompanied by deceptive practices indicative of complete contempt and utter disregard for the court order (R. 113). If criminal prosecution had been brought under Section 205 (b) of the Emergency Price Control Act, a fine up to $5,000 and imprisonment up to a year could have been levied for each one of the many violations established. In the light of these considerations, the sentence of a year and a day in the penitentiary, which was meted out to the petitioner, is not excessive.

CONCLUSION

The decision below is correct and presents no question meriting review by this Court. The petition should therefore be denied.

Respectfully submitted.

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APRIL 1944.

U. S. GOVERNMENT PRINTING OFFICE 1944